

ENTERED

November 26, 2019

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

UNITED STATES OF AMERICA,**Plaintiff,****v.****VICTOR HENRY,****Defendant.**§
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§**CASE NO. 4:18-CR-0719**

ORDER

Pending before the Court is Defendant Victor Bernard Henry's Motion to Suppress Evidence. (**Instrument No. 16**). A Suppression Hearing was held Tuesday, November 19, 2019 at 9:00 A.M.

I.

On February 18, 2018, Department of Public Safety officer Andrew Papanos ("Papanos") was investigating an individual, previously identified as "Casper", for suspected narcotics trafficking. (Instrument No. 17 at 1). According to the Government, Casper had been described as a heavyset adult black male, approximately 20 years of age, had short dreadlocks, and was believed to be driving a black Chevrolet. *Id.* Papanos claims that same day, at approximately 11:30 p.m., he and DPS Lieutenant Scott Rosenberry ("Rosenberry") just happened to spot an individual fitting the description of Casper driving a black Dodge Challenger at a gas station in Houston, Texas. (Instrument No. 17 at 2). Papanos and Rosenberry followed the individual, who was later identified as Victor Henry ("Henry"). *Id.* While Papanos and Rosenberry were following Henry on Highway 45, they observed Henry discard a lit cigarette from his vehicle. *Id.* Upon this observation, Papanos requested assistance from Troopers Mackenzie Brown

("Brown") and Dannie Gutierrez ("Gutierrez"). *Id.* The evidence revealed that at approximately 11:37 p.m., Brown checked the speed of Henry's Vehicle and the radar showed that Henry was traveling at 68 mph in a 65-mph zone. *Id.* As Henry changed lanes to the far left, or innermost lane of the highway, Brown observed both of Henry's driver side tires cross the yellow line and onto the improved shoulder way. *Id.* Brown then activated his emergency lights and asked Henry to exit the highway to which Henry complied.

The Government alleges that upon Brown's contact with Henry, Brown observed Henry's hand shaking which he interpreted as a sign of nervousness. *Id.* Brown then asked Henry to exit the vehicle where he began questioning Henry about his itinerary. *Id.* The Government alleges that approximately seven minutes into the traffic stop, Brown returned to his vehicle and began running checks on Henry. (Instrument No. 17 at 3). Brown then informed Henry that he was going to write him a warning for his traffic violations and made him aware that he had a suspended license. *Id.* The Government alleges Brown asked for and received consent to search Henry's vehicle. *Id.* As a result of that search, approximately 24 minutes into the traffic stop, the officers found paper work in Henry's car which they believed confirmed Henry's identity as Casper. *Id.* Papanos then informed Brown that he believed Henry was Casper. *Id.* Consequently, Papanos patted Henry down for a second time. *Id.* The Government asserts that at approximately 29 minutes into the traffic stop, and 12 seconds after opening the hood, DPS Special Agent Sherwin Sanders discovered a t-shirt under the hood of the car, wrapped in a plastic grocery bag. *Id.* The bag contained eight smaller plastic bags containing a substance later identified as heroin. *Id.* Henry was then placed under arrest for possession of a controlled substance (heroin). *Id.*

On, April 10, 2019, Defendant filed a motion to suppress evidence (Instrument No. 16). On April 26, 2019, the Government responded to Defendant's motion to suppress evidence (Instrument No. 17). Defendant filed an Unopposed Motion to Continue Suppression Hearing,

Pre-Trial and Trial Settings on September 5, 2019. (Instrument No. 28). The Court held the Suppression Hearing on November 19, 2019. (Instrument No. 23).

III.

At a suppression hearing, the Government bears the burden of establishing admissibility by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477 (1972). The Fourth Amendment protects people against unreasonable searches and seizures of their persons and effects. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). The exclusionary rule “prohibits the introduction at trial of all evidence that is derivative of an illegal search, or evidence known as the ‘fruit of the poisonous tree.’” *United States v. Singh*, 261 F.3d 530, 535 (5th Cir. 2001).

The Government justifies their search and seizure based on a two-part test: (1) the court must examine whether the officer’s action was justified at its inception; and (2) inquire whether the officer’s subsequent actions were reasonably related in scope to the circumstances that justified the stop. *United States v. Brigham*, 382 F.3d 500, 506 (5th Cir.2004) (citing *Terry*, 392 U.S. at 19-20). Under the two-part test the Government makes two arguments. Under the first prong, the Government contends the Defendant committed three traffic violations by: (1) discarding a lit cigarette from his vehicle; (2) speeding; (3) and driving on the improved shoulder of the highway. The Government argues the traffic violations gave them reasonable suspicion to hold a limited search and seizure. Under the second prong, the Government argues that Brown’s subsequent actions of questioning did not exceed the scope of the stop. Furthermore the confirmation of the Defendant’s identity as the target of a narcotics investigation along with his expired license allowed Brown additional time to detain Henry.

1.

The stopping of a vehicle and detention of its occupants constitutes a seizure under the Fourth Amendment. Validity of traffic stops are analyzed under *Terry v. Ohio*, 392 U.S. 1, 21 (1968). *Terry* holds that limited searches and seizures are not unreasonable when there is a reasonable and articulable suspicion that a person has committed a crime. *United States v. Santiago*, 310 F. 3d 336, 340 (5th Cir.2002).

Section 365.012 (a) of the Texas Health and Safety Code provides that a person commits an offense if he “disposes...of litter or other solid waste at a place that is not an approved solid waste site, including a place on or within 300 feet of a public highway.” (*McAnally v. State*, 2009 WL 3956749. at *3 (Tex. App. Nov. 19, 2009). Litter excludes ashes. *Id.* The Government need only prove that the officer had a reasonable suspicion that the defendant littered, they need not prove the actual offense of littering. *Id.* Moreover, the Government need not prove the materials the defendant allegedly littered so long as the officer had reasonable suspicion that the defendant littered. See *Id.* (holding that an officer had reasonable suspicion to conduct a traffic stop for littering when he observed an individual throw something out of his window, though the officer was not able to identify the material thrown out of the window). Littering, a class C misdemeanor, creates reasonable suspicion to momentarily detain an individual. *Simmons v. State*, 288 S.W.3d 72, 75-76 (Tex. App. 2009).

Driving above the posted the speed limit, constitutes prima facie evidence of a traffic violation. See *United States v. Castanon*, 229 Fed. App’x 312, 313 (5th Cir. 2007). (Holding defendant’s conduct constituted prima facie evidence when he was driving 71 miles per hour in a speed limit of 65 or either 70 miles per hour).

Driving on an improved shoulder of a highway is illegal unless, an individual encounters one of the three exceptions provided by, § 545.058 of the Texas Transportation Code:

(b) An operator may drive on an improved shoulder to the left of the main traveled portion of a divided or limited-access or controlled-access highway if that operation may be done safely, but only:

(1) to slow or stop when the vehicle is disabled, and traffic or other circumstances prohibit the safe movement of the vehicle to the shoulder to the right of the main traveled portion of the roadway;

(2) as permitted or required by an official traffic-control device; or

(3) to avoid a collision

Tex. Transp. Code Ann. § 545.058 (West).

Here, the Government asserts the Defendant discarded a lit cigarette from the window of his vehicle, however, the Defendant denies this. In order to establish reasonable suspicion to conduct a traffic stop, the Government need only prove that the officer has reasonable suspicion that the Defendant littered. *McAnally*, 2009 WL 3956749 at *3 (Tex. App. Nov. 19, 2009) (Holding reasonable suspicion that an individual littered is enough for an officer to conduct a traffic stop. The officer need not prove the materials the individual littered.) Additionally, the Defendant disputes that his vehicle was operating on the improved shoulder of the highway. The Government argues that Defendant was driving over the yellow line, onto the improved highway and did not meet any of the three expectations listed in the Texas Transportation Code. (see Tex. Transp. Code Ann. § 545.058 (West). Moreover, the Government alleges the Defendant was driving 68 mph in a 65 mph zone, which creates prima facie evidence of a traffic violation and provides reasonable suspicion to conduct a traffic stop. *United States v. Castanon*, 229 Fed. App'x 312, 313 (5th Cir. 2007). The Defendant argues it was impossible for the officers to have accurately measured the speed of the Defendant's vehicle due to the number of cars that passed the officer. However, the Court finds the Defendant's argument unpersuasive.

The evidence, under the totality of circumstances, suggest that the officers established reasonable suspicion to conduct a traffic stop on the Defendant.

2.

Defendant asserts in his motion to suppress, that Brown's questions regarding the Defendant's itinerary, were not even tangentially related to an investigation of why the Defendant committed the traffic violations. Additionally, the Defendant argues that it does not take 40 minutes to perform a traffic stop and asserts that the video footage displays that the stop was prolonged. The Government argues, ascertaining Brown's itinerary and running a check on Henry are permissible. Furthermore, the Government argues that the reveal of Henry's identity as Casper, his suspended license, and traffic violation allowed for additional time to detain Henry and arrest him.

Under the Fourth Amendment, authority for the seizure ends when tasks tied to the traffic infraction are, or reasonably should be completed. When consent is the product of an unlawfully extended traffic stop, the consent, search and all fruit of the search may be subject to suppression. *Rodriguez v. United States*, 135 U.S. 1609 (2015). In, *United States v. Brigham*, the court determined that if fact-intensive: a traffic detention may last as long as is reasonably necessary to effectuate the purpose of the stop, including the resolution of reasonable suspicion, supported by articulable facts within the officer's professional judgement, that emerges during the stop. *Brigham*, 382 F.3d 500, 506 (5th Cir.2004). The court held that officers are allowed to question the passengers' itinerary as a legitimate investigatory device in the first instance. *Id.*

Here, the Government has established an intervening factor to prolong the detainment of the Defendant. That is the discovery of the Defendant's suspended license. However, the Court would be remiss if it did not acknowledge the numerous irregularities associated with this traffic stop. The law enforcement officer involved in this stop had a body camera that was not

functioning, a microphone that was not functioning and a GPS on his car that was not functioning. His partner had a functioning body camera but no microphone and could choose to turn the camera on whenever he wanted to, but did not do so until sometime after the Defendant had been removed from his car. Furthermore, the Texas Department of Public Safety destroyed the unredacted version of the MDT log pertaining to this traffic stop even though they were aware there was an ongoing investigation and a pending criminal case. This appears to the Court to be more than ineptitude. Rather it strikes the Court as a callous disregard for the safeguards put in place to assure that all interactions between the police and the accused are documented. It is as if the officers felt that none of these safeguards were necessary because they never expected any of their actions to be questioned. The officer testified that he removed the driver from the car because his hand was shaking from nervousness. After watching nearly forty-five minutes of video showing the Defendant's interaction with the officers, it is obvious that he did not appear to have any nervousness interacting with the officers. In fact, they had prolonged conversations about boats, fishing, the type of fish that were biting, the design of the boat, the Defendant's brother and various other small talk.

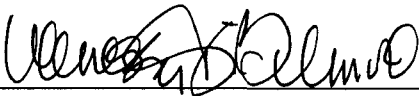
As the court analyzed the basis for the officer's justification for removing the Defendant from the car, this evidence forces the court to conclude that the officer's testimony is totally lacking in credibility. Moreover, the stated reason that the officer proffered as the basis for asking to search the car was that the Defendant was overly friendly in his interaction with the officer and in a hurry to conclude the stop and get on his way. This statement appears completely pretextual. Based on this standard, if a defendant is belligerent, he is suspect and if a defendant is friendly, he is also suspect. There must be some twilight middle zone that exists that removes one from suspicion, but it is hard to glean what that might be from the testimony of this officer.

Although the officer's testimony is not credible or reasonable, the intervening discovery of the Defendant's expired driver license would have justified an arrest of Defendant. Defendant cites to *Commonwealth v. Ortiz*, to argue that consent to search may extend beyond the interior of the vehicle only with specific consent. 90 N.E.3d 735 (Mass. 2018). Even if the Massachusetts case is correct, the intervening discovery of Defendant's suspended license means that the officers could have searched the entire car incident to arrest, making discovery inevitable. In *Bringham*, the court held additional detainment was necessary when there were intervening factors such as, contradictions in the passengers' stories regarding their itinerary and the time needed for the officer to collect information from multiple passengers. *Id.* Similarly here, this was not a traffic stop dealing with solely traffic violations. Instead, as Brown was conducting the traffic stop, he discovered the Defendant had a suspended license and was a suspect in an ongoing investigation. When these intervening factors are taken into consideration, the Government has established that the officers needed additional time that would usually not be warranted in a normal traffic stop.

For these reasons, Defendant's Motion to Suppress Evidence is **DENIED**. (Instrument No. 16).

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 26th day of November, 2019.



VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE